Supreme Court, U.S.
FILED

99 197 MAY 27 1999

OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

JAMES R. BALLIET,
Petitioner

versus

WILLIAM HEYDT, JOHN R. STEFANIK,
and CITY OF ALLENTOWN,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Richard J. Orloski,
Attorney for Petitioner
ORLOSKI, HINGA & PANDALEON
111 North Cedar Crest Blvd.
Allentown, PA 18104
(610) 433-2363

I. SHOULD THIS COURT HEAR THIS CASE ON THE MERITS TO DETERMINE WHETHER THE ADA ALLOWS A PLAINTIFF TO BRING A CASE SOLELY TO RECOVER COMPENSATORY AND PUNITIVE DAMAGES, BECAUSE THE EMPLOYER HAS ALREADY GIVEN THE EMPLOYER REINSTATEMENT AND BACK PAY?

II. SHOULD THIS COURT GRANT CERTIORARI TO DETERMINE WHETHER, CONSISTENT WITH THE AMERICANS WITH DISABILITIES ACT, PLAINTIFF COULD BE TERMINATED FOR THE PURPORTED REASON OF "SOCIOPATHIC PERSONALITY, INABILITY TO RESPECT AUTHORITY, DEPRESSION, RAGE, OCCASIONAL DESIRE TO KILL OTHER PEOPLE" AND THEN HAVE THE EMPLOYER PREVAIL BECAUSE PLAINTIFF WAS NOT "PERCEIVED AS DISABLED" UNDER THE ACT?

TABLE OF CONTENTS

	PAGE
Question Presented for Review.....	i
Table of Citations.....	iv
Opinion and Order Below.....	1
Jurisdiction.....	3
Federal Provisions Involved	3
Concise Statement of the Case.....	4
Reasons Relied Upon For Allowance of the Writ....	8
Conclusion	18
Appendix	
Order of U.S. Ct. of Appeals for the Third Circuit, per Becker entered March 2, 1999	1a
Order of U.S. Ct. of Appeals for the Third Circuit, per Nygaard entered January 29, 1999	3a

PAGE

Order of U.S. District Court for the Eastern District of Pennsylvania per E. MacTroutman, S.J. entered November 17, 1997 ..... 10a

Order of U.S. District Court for the Eastern District of Pennsylvania per E. MacTroutman, S.J. entered September 22, 1997 ..... 13a

Decision Of Arbitrator dated May 8, 1998 per Edward O'Connell Arbitrator 49a

Decision of Arbitrator dated September 16, 1997 per Alan A. Symonette, Esquire 79a

Portions of Record Below 97a

TABLE OF CITATIONS

	PAGE
Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 563 (7th Cir. 1996)	17
Deane v. Pocono Medical Center, supra	15
Does I-VI v. District of Columbia, 962 F.Supp. 202 (D.D.C. 1997)	13

OPINIONS AND ORDERS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered March 2, 1999 is unrecorded and appears at page1a of the Appendix.

The Order of the United States Court of Appeals for the Third Circuit rendered January 29, 1999 is unrecorded and appears at page 3a of the Appendix.

The Order of the United States District court for the Eastern District of Pennsylvania rendered November 17, 1997 is unrecorded and appears at page 7a of the Appendix.

The Order of the United States District court for the Eastern District of Pennsylvania rendered September 22, 1997 is unrecorded and appears at page 9a of the Appendix.

The Decision of Arbitrator dated September 16, 1997 per Alan A. Symonette, Esquire Arbitrator appears at page 60a of the Appendix.

The Decision of Arbitrator dated May 8, 1998 per Edward O'Connell Arbitrator appears at page 30a of the Appendix.

JURISDICTION

The final Order of the Court of Appeals for the Third Circuit is dated March 2, 1999. This Petition for Writ of Certiorari is filed timely within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254(1) and Rule 10(c) of this Honorable Court. The jurisdiction of the Court of Appeals was based upon 28 U.S.C. §1291.

FEDERAL PROVISIONS INVOLVED

The Americans with Disabilities Act [ADA] 42 U.S.C. §12101 et seq.

> "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

CONCISE STATEMENT OF THE CASE

In August, 1984, James Balliet became a police officer with the City of Allentown. He served ably as a patrolman until April, 1990, at which time "Balliet was placed on inactive status as a result of his psychological disability..." according to then police chief Wayne Stephens, who so stated in a sworn affidavit submitted to a district court in prior litigation, Appendix page 82a. Acting on behalf of the Defendant City of Allentown, Stephens terminated Balliet, due to, inter alia, "sociopathic personality, his inability to respect authority, his depression, his rage, his occasional desire to kill other people," Appendix at page 77a (1992 Arb. Deci. At 11). Petitioner has maintained throughout that, in fact, he suffers from no such mental disability or those specific psychological problems.

A relatively tortured procedural history thereafter can be summarized as follows. Balliet litigated his discharge, premised on the above reasons, pursuant to his Collective Bargaining Agreements, before neutral arbitrators. Each time Balliet prevailed before the arbitrators, and each time he was again suspended by the City of Allentown immediately after prevailing. Balliet then filed a Charge of Discrimination with the EEOC and the Pennsylvania Human Relations Commission, alleging an illegal termination under the Americans with Disabilities Act on the perception of a disability.

The last of these terminations, after having prevailed before a neutral arbitration, was on June 2, 1997, which was again premised on the City of Allentown's perception that Balliet was suffering from the "psychological problems" as articulated above. At this time, another Collective Bargaining appeal of Balliet's termination was pending before another neutral arbitrator.

On May 8, 1998, that Arbitrator concluded that the City failed to meet its burden of proof under the Collective Bargaining Unit of showing that Officer Balliet is permanently unable to perform the essential functions of a police officer.

Appendix page 54a. Defendant's interjected this Arbitration Award into this matter which was before the court of appeals. Defendant claimed that Mr. Balliet's success in obtaining reinstatement and back pay from his successful arbitration rendered Balliet's ADA claim "moot and unnecessary."

On January 29, 1999, the Court of Appeals affirmed the dismissal of Balliet's ADA claim, on the grounds that Balliet failed to produce evidence that his employer perceived him to be disabled, and because a neutral arbitrator had award Balliet full back pay and reinstatement which rendered his ADA claim "moot and unnecessary," Appendix at pages 3a (4-5 of 3d Cir op. of 1/29/99). On March 2, 1999, the court of appeals denied Mr. Balliet's petition for rehearing in banc.

The basis for federal jurisdiction in this case is the Americans with Disabilities Act [ADA], 42 U.S.C. §12101 et seq. and 28 U.S.C. §1331 and §1343, 42 U.S.C. §1983.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

I. SHOULD THIS COURT HEAR THIS CASE ON THE MERITS TO DETERMINE WHETHER THE ADA ALLOWS A PLAINTIFF TO BRING A CASE SOLELY TO RECOVER COMPENSATORY AND PUNITIVE DAMAGES, BECAUSE THE EMPLOYER HAS ALREADY GIVEN THE EMPLOYER REINSTATEMENT AND BACK PAY?

The Court of Appeals, in affirming the dismissal of Petitioner's case below, wrote that Finally, it appears that Balliet, as the result of a grievance arbitration award, has been reinstated with full back pay and benefits to his position as a patrolman with the Allentown Police [.] In other words, the relief sought has been obtained, albeit through an administrative proceeding and not a judicial one there likely making any ADA claim moot and unnecessary.

Such a statement of the law amounts to a judicial overruling of the American with Disabilities Act, inasmuch as the Act provides that a discrimination plaintiff may recover compensatory damages for pain and suffering, as well as punitive damages. See 26 U.S.C. Section 12117(a).

This Court ought to examine this important issue of statutory construction. Specifically, is the Court of Appeals correct that if an employer can evade ADA liability by reinstating an employee, and paying full back pay? Such an interpretation seems to conflict with the text of the statute, and as such, ought to come from the United States Supreme Court. In the alternative, the United States Supreme Court could clearly and briefly find that an ADA employment discrimination plaintiff is entitled to bring an action to recover compensatory and punitive damages, even if he has already received full back-pay and reinstatement pursuant to an administrative proceeding. In either case, the issue warrants review by this Court.

II. SHOULD THIS COURT GRANT CERTIORARI TO DETERMINE WHETHER, CONSISTENT WITH THE *AMERICANS WITH DISABILITIES ACT*, PLAINTIFF COULD BE TERMINATED FOR THE PURPORTED REASON "HAS A 'PSYCHOLOGICAL DISABILITY', IS PSYCHOTIC, SUICIDAL, AND DESIRES TO KILL OTHER PEOPLE" AND THEN HAVE THE EMPLOYER PREVAIL BECAUSE PLAINTIFF WAS NOT "PERCEIVED AS DISABILED" UNDER THE ACT?

A review of the merits of this case will allow this Court to explore the contours of what constitutes a "perception of disability" under the ADA. Specifically, this Court will have the opportunity to address the interpretation of the Regulation providing that a disability is a substantial limitation on a major life activity, such as working. This Regulation has been interpreted by a multitude of lower courts to require an almost impossibly high standard of proof. Such interpretations have resulted in, by one estimate, 94% of all ADA employment cases being dismissed at summary judgment. The particular facts at issue here, specifically the fact that the City attempted to terminate Petitioner because he "had a desire to kill people" is a disability which substantially limits Petitioner in the major life activity of working. A decision on whether a purported reason for termination, e.g., that the employee has psychological problems including a desire to kill people, constitutes a substantial limitation on Petitioner's ability to work, will give the federal trial courts considerable aid in applying the proper burden on proof to ADA employment discrimination plaintiffs, and all fact-intensive an inquiry is demanded to determine what a limitation on "working" is.

A covered "disability" under the ADA is defined as follows:

(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(b) a record of such an impairment; or

(c) being regarded as having such an impairment.

42 U.S.C. §12102(2); 29 C.F.R. 1630.2(g).

Mr. Balliet bases his ADA claim on the third statutory definition of disability in that he suffers from no actual impairment but employer treated him as mentally disabled.

Petitioner's contention that a purported reason for termination of "psychological problems including a desire to kill people" is a perceived disability as a matter of law is worthy of review by this Court. The court of appeals adopted the following findings of the district court:

> "Plaintiff relies entirely upon defendant's own descriptive words concerning his perceived psychological problems to establish that defendants regard him as disabled. Such limited proof of an essential element of plaintiff's ADA claim is insufficient as a matter of law to establish, or even to allege, that defendants regard plaintiff as 'disabled' as that term is defined in the ADA."

Opinion of U.S. District Court for Eastern District of Pennsylvania dated September 22,1997 at page 15/Appendix page 20a. Notably, the trial court did not repeat the words used by the employer, which included "sociopathic personality, his inability to respect authority, his depression, his rage, his occasional desire to kill other people." Petitioner believes that the question of whether such language in a purported reason for termination of a ADA plaintiff is, or is not, sufficient as a matter of law to show perception of disability, is worthy of review by this Court.

Sociolpathology, rage, and homicidal tendencies are broad enough disabilities that an ADA "perceived as disabled" Plaintiff ought not be required to additionally prove that that such traits are inconsistent with his job duties. The ADA clearly does not allow an individual to proceed on an ADA claim on the basis that he is perceived as disabled, merely because his cannot

perform the function of the job at issue in each unique case. See Does I-VI v. District of Columbia, 962 F.Supp. 202 (D.D.C. 1997). Indeed, the City does not provide detailed justification for its termination of Balliet as a police officer because he desires to kill others. The City's consistent position, throughout this eight year controversy, has been that Balliet's psychological problems, as described by them, render him unfit for duty. The irony in this case is that both the trial court and the Court of Appeals determined that Petitioner needed to make a threshold showing that such a perception was tantamount to a perception of disability. Petitioner avers that the question of standard of proof under the ADA could be definitively answered by a review of this case on its merits.

If Officer Balliet had the mental impairments perceived by employer he would be precluded from employment both within his chosen profession and every other employment position imaginable. Petitioner contends that, as a matter of law under the ADA, the psychological characteristic of occasionally wanting to kill other people substantially limits one's ability to work.

Defendants' perception of Balliet's mental condition constituted a "significant restrict[ion] in [Balliet's] ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training skills, and abilities." 29 C.F.R. §1630 2(j) 3(I). The quality of being free from even the occasional desire to kill people is not merely necessary in one's working life, it is necessary to lead any semblance of a normal life. Thus, by admitting that he was being terminated for having this trait, the City implicitly acknowledged that it considered him significantly mentally disabled. impaired thus satisfying the ADA threshold. Deane v. Pocono Medical Center, supra. Unlike a situation where Balliet was conceding that he had this disability, in which case it is exceedingly unlikely that he might be accommodated, Balliet has consistently denied that he has any such disability, and any such homicidal tendencies. Indeed, Balliet has

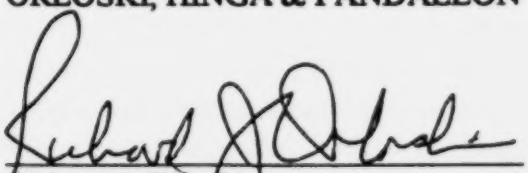
convinced three neutral grievance arbitrators that he ought to be allowed to work as an armed police officer for the City of Allentown. Because Balliet is a "regarded as" Plaintiff, he ought not bear the burden of proving that a disability -- which he denies having – can be accommodated. Clearly, Balliet contends that he is capable of performing the job duties of an Allentown Police Officer without accommodation, because he denies having a disability, and no less than three grievance arbitrators have agreed with him. The narrow issue in this case is whether a "regarded as" plaintiff can proceed to trial when his employer perceives a disabling condition, but which the employee denies having to any extent. Such a case turns the normal formula – the employee attempting to maximize the extent to which he is disabled, and the employer trying to minimize it – on its head. Resolving this important issue of the shifting burden for a "regarded as" ADA employment discrimination plaintiff is a question that ought to be resolved by the highest court in the land.

The actually disabled ADA employment discrimination plaintiff must prove that he is capable of performing his job, or his job with conditions attached to accommodate his disability, in order to prevail. See, e.g., Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 563 (7th Cir. 1996). Balliet, a "regarded as" plaintiff, contends that he can perform his job functions without any sort of accommodation, because his employer is misperceiving him to have a horrible psychological disability. Thus, there can be no question that Balliet is a "qualified individual" pursuant to the ADA. The Supreme Court ought to hear this case to determine whether a "regarded as" ADA plaintiff can prevail when he is perceived to have a disability that is seemingly not subject to accommodation, but where the employee categorically denies any such disability.

CONCLUSION

For the foregoing reasons, Petitioner James R. Balliet asks this Honorable Court to grant his Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and review this case on its merits.

Respectfully submitted,
ORLOSKI, HINGA & PANDALEON



Richard J. Orloski,
Attorney for Petitioner
Attorney ID No. 09857
111 North Cedar Crest Blvd.
Allentown, PA 18104
(610) 433-2363